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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ROBERT LEE MCKNEELY,<br>Defendant and Appellant. | A126686<br>(Contra Costa County<br>Super. Ct. No. 05-081501-9) |

Pursuant to a negotiated disposition, appellant Robert Lee McKneely entered a plea of no contest to possession of cocaine base for sale. (Health & Saf. Code, § 11351.5) Sentence enhancement allegations of several prior drug convictions (Health & Saf. Code, § 11370.2, subd. (a)) were dismissed, and McKneely was sentenced to a stipulated term in state prison of three years.

McKneely appeals from denial of his motion to suppress evidence seized from his person (Pen. Code, § 1538.5)[1] which formed the basis for his conviction. He also contends that he is entitled to receive additional presentence custody credits under section 4019, as amended January 2010. We agree that section 4019 has retroactive application and will order modification of McKneely's sentence to reflect additional custody credits. We otherwise affirm.

## I. BACKGROUND

On October 10, 2008, San Pablo Police Sergeant Jeff Palmieri observed McKneely walk up to an SUV stopped in the roadway on Harbor Way near Pennsylvania Street in

[1] All subsequent code references are to the Penal Code unless otherwise indicated.

the City of Richmond. The area was "known for high drug trafficking" with shootings and assaults in the area associated with that trafficking. Palmieri, who was assisting Richmond police, was a veteran officer and a qualified expert in issues of possession of cocaine and possession of cocaine for sale.

Palmieri exited his vehicle and approached the SUV because it was impeding traffic. As he walked toward the vehicle from McKneely's rear, he saw McKneely talking to the driver of the vehicle through the open right front passenger window. He observed McKneely quickly put his right hand into his waistband, put it in through the passenger window, and quickly remove it, looking around as he did so. Palmieri had observed drug transactions in similar situations during prior surveillance operations, and he believed that McKneely's actions were indicative of a drug deal. He called out to McKneely, who then looked at the officer, turned and yelled at the driver of the SUV "Go. Go. It's the police."[2]

McKneely was detained at gunpoint and handcuffed. Once backup officers arrived, Palmieri patsearched McKneely for weapons. Palmieri described the method he uses in conducting a patsearch for weapons, particularly with baggy clothes, including grabbing the pockets. He related an incident in which a gun had fallen down a suspect's pant leg as he did so. As Palmieri grabbed the area of McKneely's right front pocket, he felt hard granular objects inside the pocket. Based on his training and experience "and the hundreds of narcotics arrests that [Palmieri had] made," he "knew by feeling it that it was rock cocaine." Palmieri removed three baggies from McKneely's pocket containing separately packaged white chunky material later confirmed to be cocaine base.

McKneely was charged by information with possession of cocaine base for sale. (Health & Saf. Code, § 11351.5) It was further alleged that McKneely had suffered prior felony convictions for either sale, or possession for sale, of controlled substances (Health & Saf. Code, § 11370.2, subd. (a)) and that he was ineligible for probation as a result of prior felony drug convictions (Health & Saf. Code, § 11370, subd. (a)). On October 27,

[2] Palmieri was in full police uniform.

2009, McKneely's motion to suppress the evidence seized from his person (§ 1538.5) was heard and denied. On October 29, 2009, McKneely entered a plea of no contest to possession for sale of base cocaine pursuant to a negotiated disposition. The sentence enhancement allegations were dismissed and McKneely was sentenced to the agreed term of three years in state prison. McKneely received custody credit for 185 days, and "conduct" credit of 92 days under the then operative version of section 4019.

McKneely filed a timely notice of appeal, based on denial of his motion to suppress.

## II. DISCUSSION

### A. The Motion to Suppress

" 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

1. *The Scope of the Patsearch*

McKneely does not contest here the validity of his initial detention by Palmieri, nor does he dispute that the officer was entitled under the circumstances to conduct a patsearch of his person for weapons.[3] McKneely focuses his challenge on the scope of the patsearch conducted by the officer, arguing that the search conducted by Palmieri was unduly intrusive, and that squeezing the contents of McKneely's pocket went beyond the limits of "a careful exploration of the outer surfaces of [McKneely's] clothing," citing *People v. Collins* (1970) 1 Cal.3d 658, 662 (*Collins*).

[3] As we discuss *post*, the officer's observations and his expertise gave him some basis for believing defendant was selling drugs. " ' "[I]t is not unreasonable to assume that a dealer in narcotics might be armed" ' and subject to a pat-search." (*People v. Limon* (1993) 17 Cal.App.4th 524, 535, citing *U.S. v. Salas* (9th Cir. 1989) 879 F.2d 530, 535.)

The United States Supreme Court has long recognized that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." (*Terry v. Ohio* (1968) 392 U.S. 1, 27 (*Terry*).) This protective search is not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. [Citation.]" (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373 (*Dickerson*).)

Following *Terry*, our own Supreme Court adopted the language in that case holding that "[i]n balancing the safety of police officers against the Fourth Amendment's proscription of unreasonable intrusions, . . . in searching a legally detained individual reasonably suspected of being armed, a police officer must be limited to 'a careful exploration of the outer surfaces of [the] person's clothing.' " (*Collins, supra*, 1 Cal.3d at p. 662, citing *Terry, supra*, 392 U.S. at p. 16.) The court went on to state that "[f]eeling a soft object in a suspect's pocket during a pat-down, absent unusual circumstances, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object." (*Collins*, at p. 662.)

The first question presented then is: Did the protective search conducted by Palmieri go beyond what was necessary to determine if McKneely was armed? We find that it did not.

Palmieri testified that his purpose in conducting the patsearch of McKneely's person and clothing was only to determine if he was armed. Palmieri described his practice of "squeezing" the pockets of the clothing when doing so, and his reasons for that practice, particularly with baggy clothing. He said "So when I do pat searches, I always grab the pockets to make sure that there's no weapon inside." He related an incident in which a gun had fallen down a suspect's pants leg while he was conducting such a patsearch and testified that "it's not uncommon for even large weapons as big as a

nine millimeter to be hidden in the clothing in the crotch area or in large pants." McKneely was wearing loose fitting jeans and a sweatshirt.

The People direct our attention to a decision of the Wisconsin Court of Appeal, holding that "an officer is entitled not just to a patdown but to an *effective* patdown in which he or she can reasonably ascertain whether the subject of the patdown has a weapon." (*State v. Triplett* (Wis.Ct.App. 2005) 707 N.W.2d 881, 884 (*Triplett*).) In that case the officer had difficulty searching the defendant's waist area due to the defendant's large frame and the heavy clothing he was wearing. The officer thought he could get a better patdown if he first loosened any weapons that might be hidden in the waistband, so he tugged on the defendant's belt loops and gave the waistband a few shakes. As he shook, a clear plastic bag containing cocaine base dropped from the bottom of the defendant's right pants leg. (*Id.* at p. 882.) Upholding the scope of the patsearch, the court observed that the Supreme Court in *Terry* had refused to adopt any bright-line rule for what constitutes a reasonable search for weapons, and recognized that the proper scope of such a search depends on the unique circumstances in each individual case. (*Id.* at pp. 883–884, citing *Terry*, 392 U.S. at p. 29 [Fourth Amendment limitations on a protective seizure and search for weapons "have to be developed in the concrete factual circumstances of individual cases"].) We agree with the holding, and the reasoning, in *Triplett*.

We find nothing in the authorities cited by McKneely that would prohibit the technique used by the officer here, nor do we find it unreasonable under the facts before us. In *Dickerson*, the patsearch revealed no weapons, but the officer conducting it testified that he felt a small lump in respondent's jacket pocket. The officer never thought that the lump was a weapon, and did not immediately recognize it as cocaine. Rather, he determined that it was contraband only after he squeezed, slid, and otherwise manipulated the pocket's contents, and then believing it to be a lump of crack cocaine, reached into the defendant's pocket and retrieved a bag of cocaine. (*Dickerson, supra,* 508 U.S. at pp. 377–378.) The high court held that, while *Terry* entitled him to place his hands on respondent's jacket and to feel the lump in the pocket, his continued exploration

of the pocket after he concluded that it contained no weapon was unrelated to the sole justification for the search under *Terry*. (*Id.* at p. 379.) In *Collins*, the officer ran his hand over defendant's left front pants pocket, and felt a "little lump." (*Collins, supra,* 1 Cal.3d at p. 660.) When the defendant pushed the officer's hand away, the officer put his hand into defendant's pocket and removed a plastic bag containing marijuana. (*Ibid.*) While first expressing "grave doubts" about the validity of the detention in the first instance, the court found that the patdown conducted of Collins was not confined in scope to "an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Id.* at pp. 660, 662, 664.) The court did not hold that the officer's action in feeling the soft object through the exterior of Collin's pocket was unreasonable, but rather that feeling such an object did not reasonably support a belief that there was a weapon on defendant's person. (*Id.* at p. 664.) In *People v. Dickey* (1994) 21 Cal.App.4th 952, an officer testified that he felt an object in the defendant's pocket that "felt like plastic or felt like a plastic baggie with something in it." (*Id.* at p. 955.) He reached into the pocket and retrieved a baggie containing marijuana and cocaine. (*Ibid.*) The court first held that there were no specific and articulable facts presented to justify a patdown at all. (*Id.* at p. 956.) It went on to find that, even if a patdown would have been justified at its inception, the search became impermissible in its scope when the officer reached into the defendant's pocket. " 'Feeling a soft object in a suspect's pocket during a pat-down, *absent unusual circumstances*, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object.' [Citation.]" (*Id.* at p. 957, italics added.)

The Supreme Court in *Terry* recognized that any patsearch or "frisk" is inherently "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." (*Terry, supra,* 392 U.S. at p. 17, fn. omitted.) Describing the significance of the intrusion the court noted that, "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the

groin and area about the testicles, and entire surface of the legs down to the feet." (*Id*. at p. 17, fn. 13.) The intrusion here was certainly no greater.

As the *Dickey* court observed, "[t]he lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations. [Citations.]" (*Dickey, supra*, 21 Cal.App.4th at p. 957.) It is the " ' " 'reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security' " [that] is the guiding principle.' [Citation.]" (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227.) So long as the purpose of the search is reasonably and credibly focused on the discovery of weapons which might be used to harm the officer or others nearby (*Dickerson, supra*, 508 U.S. at p. 373), we see nothing more intrusive or objectionable than what is inherent in any patsearch in an external "squeeze" of pockets or other areas of clothing for that purpose. Exercising our responsibility "to independently measure the facts against the constitutional standard of reasonableness" (*People v. Daugherty* (1996) 50 Cal.App.4th 275, 281), we find the patsearch conducted here met that standard.

2. *The Search of McKneely's Pocket*

Finding the scope of the patsearch performed by the officer in this instance to be reasonable is not dispositive, but rather raises the second question we must then address: Was the further intrusion into McKneely's pocket reasonable? We again answer in the affirmative.

As our Supreme Court has held, feeling a soft object in a suspect's pocket during a patdown, absent unusual circumstances, does not warrant an officer's intrusion into a suspect's pocket to retrieve the object. (*Collins, supra*, 1 Cal.3d at p. 662, 664.) Generally, an officer may not explore the contents of a person's pockets without first feeling an object during the patdown which reasonably leads him to conclude it is a weapon. "However, if contraband is found while performing a permissible *Terry* search, the officer cannot be expected to ignore that contraband. [Citation.]" (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1075.)

The Supreme Court articulated the rule regarding "tactile discovery" of contraband in *Dickerson*. "If a police officer lawfully pats down a suspect's outer clothing and feels

an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." (*Dickerson, supra,* 508 U.S. at pp. 375–376, fn. omitted.) "The seizure of an item whose identity is already known occasions no further invasion of privacy. [Citations.]" (*Id.* at p. 377.) The internal search of the defendant's pocket in *Dickerson* was impermissible because, even though the high court found that the officer was entitled to place his hands on the defendant's jacket and to feel the lump he found in the pocket, the officer never thought that the lump was a weapon and did not immediately recognize it as cocaine. His further manipulation and exploration of the pocket after concluding that it contained no weapon was found to be unrelated to the sole justification for the search under *Terry*. (*Id*. at pp. 377–378.)

Here, Palmieri, a 23-year veteran officer who had made "hundreds of narcotics arrests" and who had qualified as an expert in the areas of cocaine possession and possession of cocaine for sale, observed McKneely approach a vehicle in the street in an area "known for high drug trafficking." He watched McKneely quickly put his right hand into his waistband, put it in through the passenger window, and quickly remove it, looking around as he did so. Palmieri had observed drug transactions in similar situations during prior surveillance operations, and he believed that McKneely's actions were indicative of a drug deal. When McKneely saw a uniformed police officer approaching, he turned and yelled at the driver of the vehicle, "Go. Go. It's the police." When he felt the object in McKneely's pocket during his search for weapons, he "knew by feeling it that it was rock cocaine." McKneely acknowledges that Palmieri suspected that McKneely's pocket contained rock cocaine "immediately upon touching it." In other words, its contraband nature was "immediately apparent" to Palmieri in light of his experience and expertise.

"Whether an officer's suspicion that an object contained within a person's clothing consists of narcotics, derived at least in part from a patdown of a person's outer clothing,

permits the officer to conduct a full-blown search of the individual or to seize the object felt depends on whether the officer had probable cause to arrest the person for narcotics possession; the warrantless search then becomes justified as a search incident to arrest. [Citation.]" (*People v. Dibb* (1995) 37 Cal.App.4th 832, 835–836, italics omitted.) " '[P]robable cause may be furnished by the officer's actual tactile perception of narcotics during a pat-search for weapons [citation], or by the officer's identification of an item which, when coupled with other circumstances, creates a reasonable inference that the item is contraband [citation].' [Citations.]" (*People v. Limon, supra,* 17 Cal.App.4th at p. 536.)

McKneely concedes that if there was probable cause to arrest him, the search of his pocket would be justified as incident to a lawful arrest.[4] In this case, the " 'officer's sensorial perception, coupled with the other circumstances, was sufficient to establish probable cause to arrest the defendant for possession of narcotics *before the entry into the pocket*.' " (*People v. Limon, supra,* 17 Cal.App.4th at p. 536.)

**B. Retroactivity of Penal Code Section 4019**

When McKneely was sentenced on October 29, 2009, the trial court awarded 185 days of actual custody credit and 92 days of "conduct" credit for a total of 277 days of presentence custody credit. Under the version of section 4019 at the time of McKneely's sentencing, a defendant earned two days of credit for every *four* days of custody unless he failed to perform assigned work or abide by the facility's reasonable rules and regulations. (Former § 4019, subds. (a)(4), (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4553.) Effective January 2010, section 4019 provided for up to

[4] The People argue that the circumstances observed by Palmieri—i.e. the nature of the area, the circumstances of the encounter between McKneely and the driver of the car, and McKneely's exhortations to the driver of the SUV to flee—provided probable cause for his arrest even prior to the patsearch. A search may be justified as incident to a lawful arrest even though the search was performed prior to the arrest. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111.) We need not address this issue in light of our conclusion that the scope of the patsearch was lawful, and that Palmieri unquestionably had probable cause to believe McKneely was in possession of contraband, at least in part as a result of that patsearch.

two days of credit for every *two* days of custody under the same conditions (with exceptions not relevant here). (Former § 4019, subds. (a)(4), (b)(1), (c)(1), (f), as amended by Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.)[5] McKneely argues he is entitled to the benefit of retroactive application of the amendments to section 4019.

Numerous, and conflicting, decisions have been published addressing the retroactive application of the amendments to section 4019. The People argue the amendments do not apply retroactively, citing *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted September 22, 2010, S184956, *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724, and *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314. (See also *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.)

In *People v. Pelayo* (2010) 184 Cal.App.4th 481 (*Pelayo*), review granted July 21, 2010, S183552, we joined several other courts of appeal in holding that the amendment to section 4019 does apply retroactively because it is an amendatory statute that mitigates punishment. (See also *People v. Jones* (2010) 188 Cal.App.4th 165, 183; *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782; *People v. Keating* (2010) 185 Cal.App.4th 364, review granted Sept. 22, 2010, S184354; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.) As indicated, our Supreme Court has granted hearing in these cases and will ultimately decide the issue. Pending direction from the Supreme Court, we adopt and incorporate

[5] Sections 4019 and 2933 have been further amended by urgency legislation, operative on September 28, 2010. (Stats. 2010, ch. 426, § 2.) The September 2010 amendments do not affect this case and do not change our analysis in this matter. Unless otherwise noted, all subsequent references to section 4019 or its amendments refer to section 4019, as amended by Statutes 2009–2010, 3rd Extraordinary Session 2009, chapter 28, section 50.

our discussion and reasoning in *Pelayo*, as set forth hereafter, and again hold that the statute must be given retroactive effect.

1. *Retroactivity of Penal Statutes in General*

The Penal Code provides that "[n]o part of it is retroactive, unless expressly so declared." (§ 3.) "That section simply embodies the general rule of construction . . . that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively." (*In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*).) The rule, however, "is not a straitjacket" and "should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent" even if the Legislature has not expressly stated that a statute should apply retroactively. (*Ibid*.) In *Estrada*, the Supreme Court considered the particular circumstance of a penal statute that lessens the punishment for a crime but does not include an express statement that the statute was to apply retroactively. (*Id.* at pp. 743–744.) In that situation, the court concluded, the inevitable inference is "that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology," which instruct that punishment is directed toward deterrence, incapacitation, and rehabilitation, but not "punishment for its own sake." (*Id.* at pp. 744–745.) Accordingly, "where the amendatory statute mitigates punishment and there is no saving clause [requiring only prospective effect], the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.) That is,

it will apply to all judgments of conviction that are not yet final on direct review. (*Id.* at p. 744.)

In 1996, the Supreme Court expressly reaffirmed the *Estrada* rule. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7 (*Nasalga*).) In a prior case, the court had suggested that the rationale of *Estrada* had been undermined by further developments in penology in this state. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045, fn. 1, citing § 1170, subd. (a)(1) ["Legislature finds and declares that the purpose of imprisonment for crime is punishment"].) In *Nasalga*, however, the court rejected an invitation to reconsider *Estrada* in light of this change in penological theory. "In the 31 years since this court decided *Estrada*, . . . the Legislature has taken no action, as it easily could have done, to abrogate *Estrada*."[6] (*Nasalga*, at p. 792, fn. 7.) In short, in *Nasalga* the court reaffirmed the *Estrada* rule on the ground of legislative acquiescence, regardless of the continuing persuasiveness of the *Estrada* rationale. (Cf. *People v. Meloney* (2003) 30 Cal.4th 1145, 1161 (*Meloney*) [" ' "[when] a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it" ' "].) After *Nasalga*, it is no longer open to debate whether the *fact* that the Legislature enacted a statute that mitigates punishment supports an inference that the Legislature *intended* the statute to apply retroactively. (*Nasalga*, at p. 792, fn. 7.)

2. *Retroactivity of Statutes Increasing Custody Credits*

In at least four prior decisions long predating the current amendments, courts of appeal have held that the *Estrada* rule applied to amendments increasing the credits a defendant could receive for presentence custody. (*People v. Hunter* (1977) 68 Cal.App.3d 389, 391–393 (*Hunter*); *People v. Sandoval* (1977) 70 Cal.App.3d 73, 87–

[6] Notably, during that 31-year period the Supreme Court had repeatedly followed and applied *Estrada*. (See, e.g., *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Rossi* (1976) 18 Cal.3d 295, 298–300; *People v. Chapman* (1978) 21 Cal.3d 124, 126–127; *People v. Babylon* (1985) 39 Cal.3d 719, 721–722; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300–301.)

88 (*Sandoval*); *People v. Doganiere* (1978) 86 Cal.App.3d 237, 238–240 (*Doganiere*); *People v. Smith* (1979) 98 Cal.App.3d 793, 798–799 (*Smith*).) As far as we are aware, no published decisions have held to the contrary. In *Hunter*, the issue was whether amendments to section 2900.5, which allowed credit for actual time spent in presentence custody against sentences imposed as a condition of probation, applied retroactively to probationary sentences imposed prior to the effective date of the amendments. (*Hunter*, at p. 391.) Following *Estrada*, the court held the amendments applied retroactively to judgments that were not yet final on the effective date of the new law. (*Ibid*.) *Sandoval* agreed with and followed *Hunter* on the same issue. (*Sandoval*, at pp. 87–88.)

In *Doganiere*, the issue was the retroactivity of amendments to section 2900.5 that authorized *conduct* credit (pursuant to § 4019) for time that had been served in jail as a condition of probation against a sentence later imposed after a violation of probation. (*Doganiere, supra,* 86 Cal.App.3d at pp. 238–239.) Following *Estrada* and *Hunter*, the court held the amendments were retroactive. (*Id.* at pp. 239–240.) In *Smith*, the court followed *Estrada* and *Doganiere* and held that 1979 amendments to section 4019 applied retroactively. (*Smith, supra,* 98 Cal.App.3d at p. 799.) In *Doganiere*, the court specifically rejected an argument that the amendments should not apply retroactively because conduct credits were an incentive for future inmate behavior, a goal that could only be accomplished through prospective application. (*Doganiere*, at pp. 239–240.) "It appears to us that in applying the principles of *Estrada*, as indeed we must, the Legislature simply intended to give credit for good behavior and in so doing, dangled a carrot over those who are serving time. It would appear to be fair, just and reasonable to give prisoner A, who has been a model prisoner and by reason thereof served only five months of his six-month sentence, credit for the full six months if we are going to give credit for the full six months to prisoner B, who is recalcitrant, hard-nosed, and spent his entire time violating the rules of the local jail." (*Ibid.*) We note that *Estrada* itself implicitly rejected a similar argument made by the dissent in that case, that retroactive application of a lessened criminal penalty undermines the deterrent effect of penal statutes. (See *Estrada, supra,* 63 Cal.2d at p. 753 (dis. opn. of Burke, J.).) *Doganiere*

concluded, "Under *Estrada*, it must be presumed that the Legislature thought the prior system of not allowing credit for good behavior was too severe." (*Doganiere*, at p. 240.) Again, under *Nasalga*, the legitimacy of that inference is no longer open to debate. (*Nasalga*, *supra*, 12 Cal.4th at 792, fn. 7.)

The People contended in *Pelayo* that the reasoning of *Doganiere* is unsound, since the public purpose of good conduct statutes is to provide effective incentives for good behavior, and that this purpose can only be furthered by prospective application of additional credits. "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*).) *Stinnette* considered an amendment to section 2931 under the Determinate Sentencing Act, which allowed prisoners to earn conduct credits but restricted application of the amendment to time served after the effective date. (*Stinnette*, at pp. 803–804.) The issue was whether the express prospective application of the statute violated equal protection. (*Id.* at p. 804.) The court concluded that it did not because there was a rational basis for treating those who had already begun serving their sentences differently from those who began serving their sentences after the effective date. (*Id.* at pp. 805–806.) Unlike *Stinnette*, the amendments to section 4019 at issue here do not specify the Legislature's intent regarding retroactive or prospective application. We find that *Stinnette* is not helpful in determining the Legislature's intent when amending section 4019.

The Legislature, which is presumed to have been aware of the *Hunter/Doganiere* case law, "has taken no action, as it easily could have done, to abrogate" these decisions in the more than 31 years since the last of them was decided. (Cf. *Nasalga*, *supra*, 12 Cal.4th at p. 792, fn. 7.) Moreover, the Legislature twice amended section 4019, in 1982 and 2009, without expressly providing that the amendments would apply prospectively only. (Stats. 1982, ch. 1234, § 7, p. 4553; Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 50.) On these facts, we may infer that the Legislature has acquiesced in *Doganiere*. (See *Meloney*, *supra*, 30 Cal.4th at p. 1161.)

3. *Legislative Intent in 2009 Amendments of Section 4019*

As the People acknowledged in *Pelayo*, the Legislature, in enacting the amendments to section 4019, did not expressly declare its intent in doing so. The appellant in *Pelayo* asserted that an intent to retroactively apply the amendments can be discerned from the statement that Senate Bill 18 was enacted to "address[] the fiscal emergency declared by the Governor" (Sen. Bill 18, § 62) and that earlier release of prisoners would foster that purpose. However, the legislative intent at issue "is not the *motivation* for the legislation" but rather "the Legislature's intent concerning whether the [enactment] should apply prospectively only." (*Nasalga, supra*, 12 Cal.4th at p. 795). The statute's purpose of saving state funds by reducing prison population while at the same time minimizing security risk is at least as consistent with retroactive as with prospective application of the amendments to section 4019.

The appellant in *Pelayo* also contended that the express use of a saving clause in other statutes amended by the same legislation (Sen. Bill 18, § 41[7]; § 2933.3, subd. (d) [providing additional custody credits for prison inmate firefighting training or service only for those eligible after July 1, 2009]) compels a conclusion that the Legislature intended retroactivity for amended section 4019. The Legislature's inclusion of a saving clause in the amendment to section 2933.3, but not in the amendments to section 4019, supports an inference that the Legislature had a different intent with respect to the retroactive or prospective application of the two provisions. (Cf. *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62 ["use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended"].) The People urged that we could divine a contrary legislative purpose for only prospective application from the fact that the amendment to section 2933.3, subdivision (d) was expressly made partially retroactive, and the Legislature *failed* to do so here. We think that the Legislature's use of the phrase "shall *only* apply" in amending section 2933.3

[7] "The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 41.)

(italics added), however, suggests an intent to *limit* the provision's retroactive application, rather than *extend* the provision's otherwise prospective application retroactively.

The appellant in *Pelayo* further argued that we could look to the Legislature's explicit recognition of inevitable delays in implementation of new custody credit calculations by the Department of Corrections and Rehabilitation (Sen. Bill 18, § 59) as evidence that the Legislature contemplated retroactive application of such credits. Section 59, an uncodified provision of Senate Bill 18, provides: "The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from the changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 59.) While ambiguous, this section does tend to support an inference that the Legislative intended the provisions affecting custody credits to have retroactive effect.

Ultimately, however, we concluded that, in the absence of clear affirmative indications that the Legislature intended the amendments to section 4019 to have prospective application only, we must apply the *Estrada and Doganiere* presumption that the amendments are retroactive as to all sentences not yet final on direct appeal at the time the amendments went into effect. We found no clear expression of such an intent and thus held that the amendments must be applied retroactively.

4. *Conclusion*

Accordingly, we conclude here that McKneely is entitled to the increased custody credits available under the 2009 amendments to section 4019.[8]

## III. DISPOSITION

The judgment is reversed as to the calculation of presentence custody credits only. On remand, the trial court shall revise its sentencing order and the abstract of judgment to reflect that McKneely earned a total of 185 days of presentence conduct credits pursuant to section 4019, for a total presentence credit of 370 days. The court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

_____
Bruiniers, J.

We concur:

_____
Jones, P. J.

_____
Needham, J.

[8] The trial court, of course, cannot be faulted for applying the version of section 4019 in effect at the time of McKneely's sentencing.